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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KAVIN W. MCCOY,) Civil No. 11-0653-MMA(WVG)
Petitioner,)
v.) ORDER DENYING MOTION FOR
ANTHONY HEDGPETH,) APPOINTMENT OF COUNSEL
Respondent.) (DOC. # 24)

On May 27, 2011, Petitioner filed a document entitled "In re
3:11-cv-00653-MMA-WVG and Discrepancies in Documents in Documents #
14 #16." (Doc. #24) In that document, Petitioner requests that an
attorney be appointed for him. Therefore, the Court construes the
document to be a Motion for Appointment of Counsel.

The Sixth Amendment right to counsel does not extend to
federal habeas corpus actions by state prisoners. McCleskey v.
Zant, 499 U.S. 467, 495 (1991); Chaney v. Lewis, 801 F.2d 1191,
1196 (9th Cir. 1986); Knaubert v. Goldsmith, 791 F.2d 722, 728 (9th
Cir. 1986). However, financially eligible habeas petitioners seeking
relief pursuant to 28 U.S.C. § 2254 may obtain representation
whenever the court "determines that the interests of justice so

1 require.'" 18 U.S.C. § 3006A(a)(2)(B) (West Supp. 1995); Terrovona
 2 v. Kincheloe, 912 F.2d 1176, 1181 (9th Cir. 1990); Bashor v. Risley,
 3 730 F.2d 1228, 1234 (9th Cir. 1984); Hoggard v. Purkett, 29 F.3d
 4 469, 471 (8th Cir. 1994).

5 The interests of justice require appointment of counsel when
 6 the court conducts an evidentiary hearing on the petition.
 7 Terrovona, 912 F.2d at 1177; Knaubert, 791 F.2d at 728; Abdullah v.
 8 Norris, 18 F.3d 571, 573 (8th Cir. 1994); Rule 8(c), 28 U.S.C. foll.
 9 § 2254. The appointment of counsel is discretionary when no
 10 evidentiary hearing is necessary. Terrovona, 912 F.2d at 1177;
 11 Knaubert, 791 F.2d at 728; Abdullah, 18 F.3d at 573.

12 In the Ninth Circuit, "[i]ndigent state prisoners applying
 13 for habeas relief are not entitled to appointed counsel unless the
 14 circumstances of a particular case indicate that appointed counsel
 15 is necessary to prevent due process violations." Chaney, 801 F.2d
 16 at 1196; Knaubert, 791 F.2d at 728-29. A due process violation may
 17 occur in the absence of counsel if the issues involved are too
 18 complex for the petitioner. In addition, the appointment of counsel
 19 may be necessary if the petitioner has such limited education that
 20 he or she is incapable of presenting his or her claims. Hawkins v.
 21 Bennett, 423 F.2d 948, 950 (8th Cir. 1970).

22 In the Eighth Circuit, "[t]o determine whether appointment of
 23 counsel is required for habeas petitioners with non-frivolous
 24 claims, a district court should consider the legal complexity of the
 25 case, the factual complexity of the case, the petitioner's ability
 26 to investigate and present his claim, and any other relevant
 27 factors." Abdullah v. Norris, 18 F.3d at 573 (citing Battle v.
 28 Armontrout, 902 F.2d 701, 702 (8th Cir. 1990)); Hoggard, 29 F.3d at

1 471; Boyd v. Groose, 4 F.3d 669, 671 (8th Cir. 1993); Smith v.
 2 Groose, 998 F.2d 1439, 1442 (8th Cir. 1993); Johnson v. Williams,
 3 788 F.2d 1319, 1322-23 (8th Cir. 1986).

4 Since these factors are useful in determining whether due
 5 process requires the appointment of counsel, they are considered to
 6 the extent possible based on the record before the Court. Here,
 7 Petitioner has sufficiently represented himself to date. From the
 8 face of the Petition, filed *pro se*, it appears that Petitioner has
 9 a good grasp of this case and the legal issues involved. Under such
 10 circumstances, a district court does not abuse its discretion in
 11 denying a state prisoner's request for appointment of counsel as it
 12 is simply not warranted by the interests of justice. See LaMere v.
 13 Risley, 827 F.2d 622, 626 (9th Cir. 1987). At this stage of the
 14 proceedings, the Court finds that the interests of justice do not
 15 require the appointment of counsel. Therefore, Petitioner's Motion
 16 for Appointment of Counsel in this regard is DENIED without
 17 prejudice.

18 Also, Petitioner seeks counsel because he states that he
 19 needs an expert to use forensic laboratory reports pertaining to his
 20 case. However, Petitioner has not shown that such appointment is
 21 necessary. The *in forma pauperis* statute, 28 U.S.C. § 1915, does not
 22 waive the requirement of the payment of fees or expenses for
 23 witnesses.^{1/} Dixon v. Ylst, 990 F.2d 478, 480 (9th Cir. 1993).
 24 Further, the appointment of an independent expert witness under
 25 Federal Rule of Evidence 706 is discretionary. See Walker v.
 26 American Home Shield Long Term Disability Plan, 180 F.3d 1065, 1071
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28 ^{1/} On April 21, 2011, Petitioner's Motion to Proceed *in forma pauperis*
 was granted.

1 (9th Cir. 1999). "Reasonably construed, [Rule 706] does not
 2 contemplate the appointment of, and compensation for, an expert to
 3 aid one of the parties." Trimble v. City of Phoenix Police Dept.,
 4 2006 WL 778697, *2 (D. Ariz. 2006). Appointment of an expert witness
 5 may generally be appropriate when "scientific, technical, or other
 6 specialized knowledge will assist the trier of fact to understand
 7 the evidence or decide a fact in issue..." Levi v. Director of
 8 Corrections, 2006 WL 845733, *1 (E.D. Cal. 2006) [citing Ledford v.
 9 Sullivan, 105 F.3d 354, 358-59 (7th Cir. 1997)]. Therefore,
 10 Petitioner's Motion for Appointment of Counsel in this regard is
 11 DENIED without prejudice.

12 The Court also notes that "[w]here the issues involved can be
 13 properly resolved on the basis of the state court record, a district
 14 court does not abuse its discretion in denying a request for court-
 15 appointed counsel." Hoggard, 29 F.3d at 471; McCann v. Armont trout,
 16 973 F.2d 655, 661 (8th Cir. 1992); Travis v. Lockhart, 787 F.2d 409,
 17 411 (8th Cir. 1986) (per curiam) (holding that district court did
 18 not abuse its discretion in denying § 2254 habeas petitioner's
 19 motion for appointment of counsel where allegations were properly
 20 resolved on basis of state court record). At this stage of the
 21 proceedings, it appears the Court will be able to properly resolve
 22 the issues involved on the basis of the state court record.

23 "The procedures employed by the federal courts are highly
 24 protective of a pro se petitioner's rights. The district court is
 25 required to construe a pro se petition more liberally than it would
 26 construe a petition drafted by counsel." Knaubert, 791 F.2d at 729
 27 (citing Haines v. Kerner, 404 U.S. 519, 520 (1972) (holding pro se
 28 complaint to less stringent standard) (per curiam)); Bashor, 730

1 F.2d at 1234. The Petition in this case was pleaded sufficiently to
 2 warrant this Court's order directing Respondent to file an answer or
 3 other responsive pleading to the Petition.

4 "The district court must scrutinize the state court record
 5 independently to determine whether the state court procedures and
 6 findings were sufficient." Knaubert, 791 F.2d at 729; Richmond v.
Ricketts, 774 F.2d 957, 961 (9th Cir.1985); Rhinehart v. Gunn, 598
 8 F.2d 557, 558 (9th Cir.1979) (per curiam); Turner v. Chavez, 586
 9 F.2d 111, 112 (9th Cir.1978) (per curiam). Even when the district
 10 court accepts a state court's factual findings, it must render an
 11 independent legal conclusion regarding the legality of a peti-
 12 tioner's incarceration. Miller v. Fenton, 474 U.S. 104, 112
 13 (1985). The district court's legal conclusion, moreover, will
 14 receive de novo appellate review. Hayes v. Kincheloe, 784 F.2d
 15 1434, 1436 (9th Cir. 1986).

16 The assistance counsel provides is valuable. "An attorney
 17 may narrow the issues and elicit relevant information from his or
 18 her client. An attorney may highlight the record and present to the
 19 court a reasoned analysis of the controlling law." Knaubert, 791
 20 F.2d at 729. However, as the court in Knaubert noted: "unless an
 21 evidentiary hearing is held, an attorney's skill in developing and
 22 presenting new evidence is largely superfluous; the district court
 23 is entitled to rely on the state court record alone." Id. (citing
 24 Sumner v. Mata, 449 U.S. 539, 545-57 (1981), and 28 U.S.C.
 25 § 2254(d)). Because this Court denies Petitioner's motion for
 26 appointment of counsel, it must "review the record and render an
 27 independent legal conclusion." Id. Moreover, because the Court
 28 does not appoint counsel, it must "inform itself of the relevant

1 law. Therefore, the additional assistance provided by attorneys,
2 while significant, is not compelling." Id.

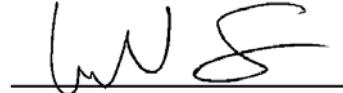
3 If an evidentiary hearing is required, Rule 8(c) of the Rules
4 Governing Section 2254 Cases requires that counsel be appointed to
5 a petitioner who qualifies under 18 U.S.C. § 3006A(a)(2)(B). Rule
6 8(c), 28 U.S.C. foll. § 2254; see Wood v. Wainwright, 597 F.2d 1054
7 (5th Cir. 1979). In addition, the Court may appoint counsel for the
8 effective utilization of any discovery process. Rule 6(a), 28 U.S.C.
9 foll. § 2254. For the above-stated reasons, the "interests of
10 justice" in this matter do not compel the appointment of counsel.
11 Accordingly, Petitioner's Motion for Appointment of Counsel is
12 **DENIED** without prejudice.

13 IT IS SO ORDERED.

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15 DATED: June 6, 2011

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Hon. William V. Gallo
U.S. Magistrate Judge

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